

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

ADOPTION OF INTERCONNECTION)	
AGREEMENT PROVISIONS BETWEEN)	CASE NO.
BELLSOUTH TELECOMMUNICATIONS, INC.)	2004-00235
AND CINERGY COMMUNICATIONS COMPANY)	
BY SOUTHEAST TELEPHONE, INC.)	

O R D E R

On June 8, 2004, SouthEast Telephone, Inc. ("SouthEast") filed a notice of intent to adopt a provision of an interconnection agreement between BellSouth Telecommunications, Inc. ("BellSouth") and Cinergy Communications Company ("Cinergy"). SouthEast argued that it was entitled to adopt that portion of the agreement pursuant to 47 U.S.C. § 252(i). BellSouth argued that the portion was not adoptable. One month after SouthEast filed its notice of adoption, the Federal Communications Commission ("FCC") by order changed the rules interpreting 47 U.S.C. § 252(i). On September 29, 2004, the Commission entered its Order permitting the adoption on the basis that, under the requirements existing when SouthEast filed, the adoption should be granted. The Commission had noted that the rules pursuant to which SouthEast filed its notice permitted competitive carriers to opt-in to less than an entire interconnection agreement. The new rules released July 13, 2004 require competitive carriers to opt-in to an entire agreement.

On October 18, 2004, BellSouth filed a motion for a rehearing. On October 28, 2004, SouthEast responded to BellSouth's motion. On November 3, 2004, BellSouth replied to SouthEast's response.

BellSouth argues that the Commission must apply existing FCC rules to pending matters. BellSouth contends that federal courts have consistently applied FCC regulations that are in effect when an agreement is reviewed. In U.S. West v. Jennings, the Ninth Circuit Court of Appeals held that, "[B]ecause the role of the federal courts is to determine whether the agreements comply with the Act, and because the FCC properly has exercised its authority to implement the Act by means of promulgating regulations, we conclude that we must ensure that the interconnection agreements comply with current FCC regulations, regardless of whether those regulations were in effect when the [Public Service Commission] approved the agreements." 304 F.3d 950 at 956. The opinion describes the role of a reviewing court in an arbitration case, not a case regarding the adoption of an existing and currently effective contract term.

In its response to BellSouth, SouthEast asserts that Section 252(i) permits carriers to pick and choose individual elements of existing agreements. All it was required to do to opt-in successfully to these provisions, according to SouthEast, was to notify the incumbent of its intent to adopt. This was accomplished a month before the change of FCC interpretation. SouthEast also notes that none of the cases cited by BellSouth regard matters addressing a statutory right to adopt. Moreover, none of BellSouth's cases are from our jurisdiction.

BellSouth disagrees with SouthEast's contention that SouthEast merely had to file a request to adopt. BellSouth asserts, instead, that Commission review and issuance of an order were necessary.

However, according to the Commission's longstanding practice, SouthEast's adoption notice would have been granted by Order within a few days of receipt by the Commission but for BellSouth's objection. As SouthEast contends, carriers may delay proceedings when matters are pending in order to allow the changed laws to be applied to pending cases. To apply a change of interpretation a month after the Commission would ordinarily have entered its Order, under the circumstances of this particular case, is unjust. Moreover, BellSouth has offered no additional evidence on rehearing that could not have been offered originally. The requisite condition for rehearing, pursuant to KRS 278.400, has not been met.

IT IS THEREFORE ORDERED that BellSouth's motion for rehearing is denied.

Done at Frankfort, Kentucky, this 8th day of November, 2004.

By the Commission

Commissioner W. Gregory Coker did not participate in the deliberations or decision concerning this case.

ATTEST:

A handwritten signature in black ink, consisting of several loops and flourishes, positioned above a horizontal line.

Executive Director